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No. 94-869

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOSEPH M. PERSINGER, - - - - Petitioner,

*versus*

R. FRANK CARMAZZI,
SALES ONE, INC.,
SALES TWO, INC.,
JOHN C. MORTON,
W. GUY WILES, JR.,
WILLIAM A. TANTLINGER, Esq.,
PERSINGERS INCORPORATED,
WILLIAM F. AGEE and
BANK ONE, HUNTINGTON, WEST VIRGINIA, N.A. (Formerly, The First Huntington National Bank, N.A.) - Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### STATUTES INVOLVED

In addition to that statutory provision referenced in the Petition for Certiorari, the Respondents state that the following statutory provisions are involved in this case.

1. W. Va. Code §31-1-17 (1974):

The initial bylaws of a corporation shall be adopted by its board of directors. The power to alter, amend or repeal the bylaws or adopt new bylaws, subject to

repeal or change by action of the shareholders or members, shall be vested in the board of directors unless reserved to the shareholders or members by the articles of incorporation. The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation.

2. W. Va. Code §51-1A-1 (1976):

The supreme court of appeals of West Virginia may answer questions of law certified to it by the Supreme Court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the intermediate appellate court for any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this State which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of appeals of this State.

## STATEMENT OF CASE

This case evolves around and is totally consumed by the attempt of a combination of minority shareholders to gain control of Persingers Incorporated (PI), a West Virginia corporation, while avoiding significant financial commitment. These minority shareholders, self-named as the "Meredith Persinger Group," held approximately 16% of the PI outstanding stock.

The genesis of this action was an annual shareholders meeting on March 2, 1985 at which the minority group patriarch, Meredith Persinger, was removed and defendant R. Frank Carmazzi (Carmazzi) was installed as president and CEO of PI. Instrumental in the change was controlling shareholder John A. Persinger, son of PI's founder and nephew of Meredith Persinger, who held ap-

proximately 48% of PI's stock. Shortly after the meeting, John A. Persinger died and defendant Bank One, Huntington, West Virginia (Bank One) (formerly The First Huntington National Bank)[1] was named executor of his estate.

As executor, Bank One controlled the 48% interest in PI. Meredith Persinger and his son, Thomas Persinger, attempted to block Bank One's election of a representative on the Board of Directors by refusing to attend directors meetings and by seeking a court order preventing the holding of a special shareholders meeting. After the requested order was denied, a special meeting of shareholders was called and William F. Agee (Agee), a Senior Vice-President and Trust Officer of Bank One was installed as a director of PI.

Thereafter, Meredith Persinger, on seven different occasions between June 1985 and January 1987, and on his own initiative, offered to purchase the stock of PI held by Bank One. Each offer was received but rejected after consultation with Bank One's Trust and Investment Committee. In turn, each offer was countered following consultation with Bank One's Trust and Investment Committee. The ultimate response of Bank One was to offer to sell the shares to Meredith Persinger for $275 a share. Meredith Persinger rejected this offer.

At this juncture, defendants Carmazzi, W. Guy Wiles, Jr. (Wiles), and John C. Morton (Morton) made an unsolicited offer to Bank One to purchase the shares for $275 a share which resulted in the parties entering into a letter of intent. Then Wiles and Morton decided that they did not want to participate and Carmazzi, individually, decided to purchase the stock at the price rejected by Meredith

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[1]Banc One Corporation, an Ohio corporation, is the parent corporation of Bank One.

Persinger. Upon completion of the sale to Carmazzi, Agee, the Bank's representative, resigned from the PI Board on April 27, 1987.

PI was then merged into Sales Two, Inc.[2], a company controlled by Carmazzi, and all minority shareholders, including Meredith Persinger and the Petitioner, were cashed out as shareholders of PI.

Prior to the merger of PI and Sales Two and before the sale of stock to Carmazzi, the bylaws of PI were amended repealing a bylaw provision which placed restrictions upon, but did not prohibit, the purchase of stock by officers and directors of PI. The notice of the annual shareholders meeting sent to all shareholders, as is proper under the West Virginia Corporation Act, did not state that repeal of this bylaw provision would be taken up at this shareholders meeting. Also prior to the sale and the merger, the Board of Directors approved the purchase of 872 shares of stock held by eight shareholders, upon the request of those shareholders without solicitation by any officer or director of PI for such purchases.

Having refused to pay the cost of acquiring the stock, the Meredith Persinger Group then began its attempts to achieve by indirection what it was unwilling to do directly. Petitioner and others filed this action on May 11, 1987 against Respondents (except Agee and Bank One).

Although Petitioner, as part of the requested relief, sought a temporary restraining order, the request was denied and on May 29, 1987 the holders of 69% of the PI

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[2]Respondents Sales One, Inc., Sales Two, Inc. and Persingers Incorporated are related companies. There are no other related companies, whether designated as parent companies or subsidiaries. R. U.S. S. Ct. 29.1.

stock approved the merger of PI with Sales Two. All minority shareholders, including Petitioner, were cashed out.

Following various evidentiary hearings on Petitioner's request for a preliminary and permanent injunction, Petitioner on February 10, 1988 sought leave to amend his complaint to bring Bank One and Agee in as defendants. The district court on April 12, 1988 granted the motion and, for the first time, established a time-frame for discovery, dispositive motions *and trial.* Petitioner's amended complaint sought the same relief as in the original complaint, but now the defendants included Bank One and Agee.

Thereafter, the proceedings became enmeshed in hearings on preliminary motions and discovery. Petitioner sought an extension of the time for discovery in order to properly prepare for trial and ultimately the time-frame which had set a November 14, 1988 trial date was completely abandoned.

With discovery still in progress and Respondent's summary judgment motions pending, and without the matter being submitted for decision, the district court, by order of December 29, 1989, in a surprise decision, ordered that repeal of the bylaw by the shareholders and all subsequent acts of the officers and directors relative to the cash-out merger "be rescinded and held for naught" (Recission Ruling). Respondents appealed that ruling to the Fourth Circuit. That Court in a *per curiam* decision rendered August 3, 1990 concluded that the district court's order of rescission was not a final order and remanded the case for further proceedings. No opinion was expressed as to the merits (Appeal I). *Southeast Bank* v. *Carmazzi*, 910 F.2d 115 (4th Cir. 1990).

Thereafter, by order of August 30, 1990 the district court instructed the parties to submit proposed plans for implementation of rescission. Over their objections, Re-

spondents complied. No decision was rendered and by order of January 29, 1991 the district court referred the matter to a special master in broad terms: "to consider all issues involving the merger between Persingers Incorporated and Sales One, Inc. and Sales Two, Inc." Petitioner vehemently objected, argued that reopening the prior ruling was improper, sought to have the referral vacated, and requested transfer to another judge.

On January 23, 1991 the case was transferred from Senior Judge Dennis R. Knapp to Chief Judge Charles H. Haden, II. Thereafter, Judge Haden vacated the Rescission Ruling as premature, but expressed no opinion on the merits, and entered a time-frame order (the Vacating Order). Discovery proceeded and dispositive motions along with a pretrial order were filed by all parties. By order of June 22, 1992, Judge Haden granted Respondents' motions for summary judgment as molded (allowing Petitioner to pursue remedies of statutory valuation) and denied Petitioner's motion. An appeal by Petitioner to the Fourth Circuit followed (Appeal II).

In Appeal II Petitioner attacked as improper all aspects of the district court's order except for the court's rulings that (1) Petitioner had abandoned his causes of action for fraud, conspiracy and conversion; (2) there was no evidence to support such claims; and (3) Petitioner's 10(b)(5) claim was without merit.

Appeal II was fully briefed before the Fourth Circuit, and during oral arguments, the court expressed its view that the issues of state law being raised appeared to be appropriate for certification to the West Virginia Supreme Court. The parties were directed to confer for the purpose of drafting a set of proposed facts and certified questions. Petitioner and Respondents each submitted proposed orders, neither of which were adopted by the Fourth Circuit.

By order of June 18, 1993, the Fourth Circuit entered its order of certification. (Appendix to Petition, hereinafter referred to as "App.", p. 86). Following Petitioner's motion seeking revision of the statement of facts, an amended order of certification was entered on August 16, 1993. (App. p. 55).

Again, the issues were fully briefed and oral arguments were presented before the West Virginia Supreme Court. On February 17, 1994, the State Supreme Court ruled upon the certified questions. (App. p. 10). The Court found: "...no showing that the minority shareholders were treated unfairly, that the defendants acted improperly with regard to the minority shareholders or that the defendants gained any particular advantage as a result of an improper use of their fiduciary position." (App. p. 50). The West Virginia Supreme Court having confirmed the correctness of the district court's judgment, the Fourth Circuit affirmed the ruling below in a *per curiam* opinion. (App. p. 7).

## MISSTATEMENTS OF FACT AND LAW BY PETITIONER

The material facts are those which have been set forth in the opinions of each of the courts to consider this matter (Rescission Ruling — App. pp. 285-322; Summary Judgment Opinion of Judge Haden — App. pp. 117-135; Fourth Circuit Order of Certification — App. pp. 86-116). Those facts, as Petitioner acknowledges are not in dispute. Respondents do not, however, accept the characterizations or conclusions drawn by Petitioner in his recitation of facts.

For the guidance of the Court, Respondents would point out:

(1) Petitioner states (Petition for Writ of Certiorari, hereinafter "Petition," p. 1) that he requests relief on behalf of himself and all other shareholders of PI. This, however, is untrue. Petitioner's request

for class certification was denied by the district court in its Order of April 12, 1988 (App. p. 336). The Order denying class certification has never been appealed.

(2) The bylaw provision which Petitioner claims Respondents violated (Petition p. 27-28) was validly repealed prior to Carmazzi's purchase of Bank One's block of stock and that bylaw provision did not prohibit the purchase of stock, but only placed restrictions on such purchases. (See App. pp. 291-294.)

(3) Respondent, Agee, never admitted as Petitioner argues that he knew of a plan involving "(i) the repeal of the bylaw and (ii) the selective redemption of certain Persingers, Inc. shareholders." (Petition p. 25)

(4) The Rescission Ruling was based entirely upon West Virginia Law, no federal statute or rule was found to have been violated. Any allegations that a conflict exists in decisions of Court of Appeals is wholly erroneous (Petition p. 59). The matter before, and the rulings of, the district court were based entirely on West Virginia law, the decisions in all cases cited by Petitioner are based upon the substantive law of other jurisdictions.

(5) The Respondents, collectively, prior to the redemptions, owned and controlled more than 50% of the stock of PI.

(6) Prior notice of a bylaw repeal need not be given in advance of an *annual* shareholders meeting.

(7) Those shareholders whose stock were allegedly selectively redeemed specifically requested redemption. No officer or director of PI solicited offers for redemption.

## SUMMARY OF ARGUMENT

Through his Petition for Certiorari, Persinger would have this Court do two things: (1) by a tortured analysis

of due process, require the reinstatement of a district court judgment which reached erroneous conclusions about West Virginia law; and (2) act as an independent reviewing authority reversing the West Virginia Supreme Court's determinations as to West Virginia law. What Petitioner seeks is contrary to law, logic and established principles of judicial economy and authority.

Insofar as Petitioner's due process argument in concerned, it was within the power of the district court to vacate the interlocutory Rescission Ruling. Furthermore, Petitioner was given an opportunity, of which he availed himself, to fully and completely present his view of the case. Ultimately, that view was rejected by the district court, the West Virginia Supreme Court and the Fourth Circuit. There was no denial of due process.

Petitioner's other argument, that this Court should instruct the West Virginia Supreme Court upon West Virginia law is also without merit. Determinations by the highest court of a state upon that state's laws are conclusive. Rule of Decision Statute, 28 U.S.C. §1652; *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 814 (1938).

Finally, Petitioner rests much of his argument upon his assertion that the Fourth Circuit inappropriately certified questions of West Virginia law to the West Virginia Supreme Court. This Court may decline to consider this assertion since it is being raised here for the first time.

## ARGUMENT

### I. THE FINDINGS OF FACT ENUMERATED BY JUDGE KNAPP IN HIS RESCISSION RULING AND THE FINDINGS OF FACT CERTIFIED TO THE WEST VIRGINIA SUPREME COURT OF APPEALS ARE IDENTICAL IN ALL MATERIAL RESPECTS.

The Petitioner argues that "the facts proven by Petitioner at the 1987 trial upon which the trial judge based his rescission order precluded entry of summary judgment for Respondents in 1992." (Petition p. 53). Petitioner, however, fails to point out to this honorable Court that *all* facts set forth by Judge Knapp in his Rescission Ruling were also set forth, in almost identical language, in the Certified Questions to West Virginia Supreme Court of Appeals. The West Virginia Supreme Court of Appeals applied West Virginia law to those facts and determined that the Respondents breached no duty owed to Petitioner and violated no law protecting the rights of Petitioner. It is disingenuous for Petitioner to argue that Judge Knapp's application of West Virginia law is more accurate than West Virginia's highest court's application of West Virginia law.

If this Court were to reinstate the Rescission Ruling, as the Petitioner requests, all concepts of justice, common sense and judicial economy would be violated. The Rescission Ruling requires the institution of a plan of rescission and after institution of the plan, an appeal to the Fourth Circuit would follow. The appellate court, in turn, would be forced to reverse the Rescission Ruling based upon the now published opinion to the West Virginia Supreme Court of Appeals.

No court should ever lose sight of common sense and neither should this Court, the highest court of the United States. The Petitioner's Petition for Writ of Certiorari is frivolous and should only be viewed as such.

## II. PETITIONER WAS NOT DENIED DUE PROCESS.

Petitioner contends that he was denied notice and an opportunity to be heard before Judge Haden entered his order vacating the interlocutory Rescission Ruling. On this basis, Petitioner argues he was denied due process. What Petitioner neglected to mention in his brief, however, is:

(1) that when Judge Knapp referred the entire matter to a special master Petitioner argued, at length, the reasons why the Rescission Ruling should not be, in effect, vacated,

(2) the Rescission Ruling was interlocutory and as such the district court retained the right to amend, modify or vacate said ruling and,

(3) based upon the West Virginia Supreme Court's Rulings to Certified Questions, Judge Knapp's conclusions of law set forth in the Rescission Ruling were clearly erroneous, and any due process denial was harmless error.

Petitioner had considerable opportunity to be heard and was not denied due process.

### A. The Reopening of the Rescission Ruling Was Prompted by Judge Knapp.

The possible reopening of the Rescission Ruling was first considered by Judge Knapp, the alleged trial judge, in his referral of the matter to a special master *after* the case was sent back to the lower court by the Fourth Circuit. In referring the case to the master, Judge Knapp "authorized and directed [the special master] to consider all issues involving the merger between Persinger's Incorporated and Sales One, Inc., and Sales Two, Inc., and to report to the Court his findings of fact and conclusions of law with regard thereto". (App. p. 21) Petitioner and Respondents both understood this language to, in effect, reopen issues of liability which were determined by the Rescission Ruling. That Petitioner so understood the order is reflected in his motion to vacate it, in which he complained that the referral gave the special master sufficient power *"as to direct the master to reopen the record, to take additional evidence and virtually re-try the case."* In his motion and in two memoranda, Petitioner vehemently opposed the referral on the ground that it constituted a de facto vacation

of the Rescission Ruling. It is in this posture, with Petitioner's motion to vacate the referral to a special master pending, that the case was transferred to Judge Haden. Petitioner's contention that he was denied an opportunity to address reasons why the Rescission Ruling should not be vacated is, to say the least, disingenuous.

However, that did not end Petitioner's presentations to the district court. Petitioner followed up with arguments set forth in a motion to reconsider and in two memoranda. Having carefully considered Petitioner's position, Judge Haden denied the motion to reconsider.

In vacating the Rescission Ruling, Judge Haden simply returned the players to the field, allowing each to address the merits of the action. This was done by cross-motions for summary judgment and briefs after completion of new discovery. Upon this complete record, Judge Haden entered summary judgment for Respondents. Petitioner cannot and does not contend that there was any lack of notice or opportunity to be heard on the merits. In this regard, this case is quite similar to *Leddy* v. *Standard Drywall, Inc.*, 875 F.2d 383 (2d Cir. 1989).

*Leddy* involved a claim for additional employee benefit fund contributions under ERISA. Partial summary judgment was granted to the employer for claims based upon *res judicata*. However, when the case proceeded to bench trial, the court allowed testimony on the barred claims, and included those amounts in judgment for the claimant. The court's opinion made no reference to the employer's *res judicata* argument nor to the grant of partial summary judgment. The employer contended that it had been denied notice and an opportunity to be heard because it did not learn that the scope of consideration was to be broadened and the earlier order ignored until after judgment was entered. While the Second Circuit concluded the trial court had erred, in light of the employer's acknowledgment that

it had no other evidence to present, that error was harmless and did not require reversal.

Unlike *Leddy*, the Petitioner here was heard before the vacating order was entered. Like *Leddy*, the Petitioner here had a full opportunity to address the merits. If there was error, which respondents believe there was not, that error was harmless.

### B. The District Court Retained Power Over the Rescission Ruling.

The Fourth Circuit concluded, as grounds for its *per curiam* dismissal and remand of Appeal I, that the Rescission Ruling was not a final judgment and, therefore, was not subject to appellate review. (App. p. 260) As an interlocutory order, the Rescission Ruling was subject to revision at any time. Fed. R. Civ. P. 54(b). That is so whether the interlocutory order is revisited by the same, or another judge. *Christianson* v. *Colt Industries Corp.*, 486 U.S. 800, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988); *United States* v. *Desert Gold Mining Co.*, 433 F.2d 713, 715 (9th Cir. 1970) ("The judgment therefore remained subject to reconsideration and revision either by the same judge, a successor judge or a different judge to whom the case might be assigned.").

An interlocutory order does not acquire any greater finality merely by the fact that the case has been transferred to another judge. As was observed by Professors Moore, Lucas and Currier:

> The pre-transfer rulings constitute the law of the case and should not be lightly disturbed. They should not be treated as a special breed, however; transfer should no more freeze prior rulings than it should require their routine reexamination.[5]
>
> [5] . . . the beneficiary of such rulings should acquire no special advantage from the fortuitous event that the case was transferred from one judge to another.

> Nor generally should a judge who has been relieved of the burden of a case believe in the eternal verity of every interlocutory ruling he has made. And finally, it is wholly destructive of the process if the appellate court is called upon to compel by mandamus what it will later be called upon to reverse for error.

1B Moore's Federal Practice ¶ 0.404 [4.-2], pp. 127-129 (1991).

Thus, there was no prohibition upon Judge Haden in revisiting Judge Knapp's interlocutory ruling. Instead, the doctrine of the law of the case counsels a court to be reluctant to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice. *Christianson* v. *Colt Industries Corp.*, *supra*, 486 U.S. at 817. The circumstances existing in this case amply warranted the action taken by Judge Haden. In issuing the Vacating Order, Judge Haden did not express an opinion as to the conclusions reached by Judge Knapp. He simply stated that the Rescission Ruling was premature. By reaching that decision, Judge Haden avoided manifest injustice in keeping with the standard set forth in *Christianson*. His exercise of judicial discretion was proper under the circumstances. In retrospect, given the state of the law as now announced by the West Virginia Supreme Court in answer to certified questions, Judge Haden's order was correct and Judge Knapp's was clearly erroneous. To reinstate Judge Knapp's opinion would be manifestly unjust and violative of *Christianson* since Judge Knapp's Conclusions of Law, based entirely on West Virginia law, were wholly rejected by the highest state court in West Virginia.

### C. Any Allegations of a Denial of Procedural Due Process Should Not Be Used to Avoid the Clear Pronunciations of West Virginia's Highest Court.

While Respondents strongly contend Judge Haden's order vacating the Rescission Ruling was proper, even if it

were not, the Fourth Circuit properly certified issues of West Virginia Law to the West Virginia Supreme Court of Appeals and based upon the answers to the Certified Questions affirmed the district court's grant of summary judgment to the Respondents. A district court's adherence to the law of the case does not insulate an issue from appellate review nor bind the appellate court. *Christianson* v. *Colt Industries Corp., supra,* 486 U.S. at 817.

As was so cogently stated by the authors of Moore's Federal Practice:

> . . . the failure of the district court to follow its own decisions as the law of the case can almost never constitute reversible error. If its first decision was correct, and its second decision did not follow the first, and was incorrect, of course it might form the basis for reversal, but since it constitutes error on the merits, it is usually irrelevant that it constituted a departure from the law of the case. *If the second ruling was correct, and the first was incorrect, the court of appeals would not reverse on the ground that the district court should have adhered to its earlier erroneous decision, since both decisions are now before the court of appeals on the merits.* Similarly, if the first decision was correct and it was later followed as the law of the case, affirmance rests on its correctness, not on the doctrine of the law of the case. In sum, the doctrine of the law of the case in no way protects an erroneous judgment from reversal on appeal. (Emphasis supplied)

1B Moore's Federal Practice, ¶ 0.404 [4.-6], p. 140 (1991). *See also Hill* v. *BASF Wyandotte Corp.*, 696 F.2d 287, 290 fn. 3 (4th Cir. 1982) (Where the Court stated: "...we have not held that the 'law of the case' doctrine is so related to the very power of the second judge that we must in review affirm even a legally erroneous ruling because it was compelled as 'law of the case.'")

Therefore, as seen above, the Petitioner has not been denied due process, or if due process was denied, such denial was harmless.

## II. THE ANSWERS OF THE WEST VIRGINIA SUPREME COURT OF APPEALS TO THE CERTIFIED QUESTIONS WERE BINDING ON THE FOURTH CIRCUIT.

Four questions were certified to the West Virginia Supreme Court by the Fourth Circuit pursuant to W. Va. Code §51-1A-1, *et seq.* (App. p. 55). Inasmuch as the answer to questions 1 and 2 was "no", questions 3 and 4 were not required to be addressed. The questions answered were:

1. Did West Virginia law require advance notice that a vote to repeal Bylaw §5.4 would be considered at the annual shareholders meeting held on March 9, 1987?
2. Do the facts state a claim under West Virginia law that the defendants or any of them breached any fiduciary duties they owed to PI's minority shareholders?

In answering Question 1 in the negative, the West Virginia Court in its opinion, (App. p. 36), concluded that:

> Thus, a bylaw like section 5.4 may be proposed, amended or repealed by act of the shareholders at an annual meeting without advance notice.

Then, in answering Question 2, after an extensive analysis of the facts as related to corporate fiduciary duties, that Court found no breach of any fiduciary duty. Petitioner, obviously displeased with these answers, asserts that West Virginia's highest court reached an incorrect result by committing numerous legal errors. (Petition pp. 54-57). He asks this Court to act as an independent reviewing authority to determine the law of West Virginia, even though the West Virginia Supreme Court has, in responding to the Certification Order, delineated the law of that state. In other

words, since the state court did not announce the law to Petitioner's satisfaction, Petitioner now wants to appeal to this Court for review. This Court should not make its own ruling regarding West Virginia law.

17A Charles A. Wright, et al., Federal Practice and Procedure, *Certification to State Court*, §4248, p. 179 (1988) points out that,

> *Certification would be a pointless exercise unless the state court's answers are regarded as an authoritative and binding statement of state law.* Thus the Fifth Circuit's early suggestion that answers to certified questions are 'merely advisory and entitled, like *dicta*, to be given persuasive but not binding effect as a precedent,' has long since been forgotten and it is now accepted that the state answers are binding. (Emphasis added.)

*National Education Association, Inc.* v. *Lee County Board of Public Instruction*, 467 F.2d 447 (5th Cir. 1972), reflects the same thought as that of the Wright treatise. Plaintiffs there argued, as does the Petitioner in this case, that the Florida Supreme Court had misapplied the principles of Florida law to the facts of the case. The Fifth Circuit held that the determination made by the Florida court on certification "must necessarily be conclusive. *Erie Railroad Co.* v. *Tompkins*, 1938, 304 U.S. 64, 58 S. Ct. 814, 82 L.Ed. 1188." *Id.* at 450. In footnote 6 on page 450 the Court further explained,

> The gist of the teachers' argument is that the Supreme Court of Florida has misapplied the principles of Florida law to the facts of this case by formulating its decision in terms of a legal theory which those facts do not support. The obvious answer is that a Federal court does not second guess a State's application of its own law. *Nelms* v. *State Farm Mutual Automobile Ins. Co.*, (5 Cir. 1972), 463 F.2d 1190 [1972].

In *Anna L. Tarr, Administratrix* v. *Manchester Insurance Corporation*, 544 F.2d 14 (1st Cir. 1976), the New Hampshire Supreme Court, on certification from a United States district court, answered certain questions adversely to plaintiff and plaintiff sought an order correcting the New Hampshire court's interpretation of its own state statute, or alternatively, to recertify the question. The district court refused to grant the relief and plaintiff appealed to the First Circuit.

Apparently, the circumstances underlying the certification involved the answering of two questions concerning the New Hampshire workmen's compensation statute. The New Hampshire Supreme Court, in answering the two questions, also answered a third question whose answer was largely dispositive of the action against the plaintiff/appellant. Plaintiff/appellant's counsel discovered this circumstance after the expiration of the ten-day period allowed for filing a petition for rehearing in the state court. Instead of moving the New Hampshire court to accept a petition for "rehearing late," appellant chose to proceed in the federal district court which denied the relief requested.

The First Circuit, on appeal, was asked to correct the New Hampshire court's interpretation of its statute, or, alternatively, to recertify. The First Circuit's handling of appellant's request for relief is of considerable significance here:

> Clearly, we cannot do the former [correct the state court interpretation]. No matter what the result, we cannot 'correct' a state court's interpretation of its own law. *Mullaney* v. *Wilbur*, 1975, 421 U.S. 684, 690-91, 95 S. Ct. 1881, 44 L.Ed.2d 508.
>
> We think it would be equally inappropriate to usurp the state court's control of its docket. If appellant had sought of that court permission to file a petition for rehearing late and permission had been denied, it can-

> not be thought that we should overrule that decision by again presenting it with the question. We see no substantial difference between overruling a state court's discretion, and adopting a procedure which would have the effect of depriving the court of the opportunity of exercising one. The issue, however, lies deeper than courtesy. *The purpose of certification is to ascertain what the state law is, not, when the state court has already said what it is, to afford a party an opportunity to persuade the court to say something else. The rule of Erie R.R.* v. *Tompkins, 1938, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, calls on us to apply state law, not, if we can be persuaded to doubt its soundness, to participate in an effort to change it.*
>
> (Brackets and emphasis added.)

544 F.2d at 15.

Similarly, the Rule of Decision Statute, 28 U.S.C. §1652 requires that a federal court accept as controlling the final decision of state courts. 28 U.S.C. §1652 provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Here, the highest state court in West Virginia has spoken. The Petitioner cannot now be afforded the opportunity to persuade this Court or any federal court to say something else. Federal courts cannot "correct" a state court's interpretation of its own law, nor do federal courts second guess a state's application of its own law. The determination of the West Virginia court was conclusive.

If Petitioner felt that the West Virginia Supreme Court misapplied or misinterpreted West Virginia law and overlooked material facts, he should have filed a Petition for Rehearing as required by Rule 24 of the West Virginia Rules of Appellate Procedure.

## III. ISSUES WHICH PETITIONER HAS RAISED FOR THE FIRST TIME IN HIS PETITION SHOULD NOT BE GIVEN CONSIDERATION BY THIS COURT.

As a routine matter of defining the efficient administration of an integrated system of trial and appellate courts, this Court has long declined to consider questions presented in a petition for certiorari that have not been considered by the lower court. *Patrick* v. *Burget*, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988); *Demarest* v. *Manspeaker*, 498 U.S. 184, 112 L. Ed. 2d 608, 111 S. Ct. 599 (1991); *EEOC* v. *FLRA*, 476 U.S. 19, 90 L. Ed. 2d 19, 106 S. Ct. 1678 (1986). In keeping with this principle, certain issues raised by Petitioner in his brief bear no further consideration.

### A. Petitioner Failed to Assert Before the Circuit Court Below That It Was Improper for It to Certify Issues to the West Virginia Supreme Court of Appeals.

In his brief, Petitioner asserts that it was improper for the Fourth Circuit to certify to the West Virginia Supreme Court the issues of state law which ultimately resolved this case. As his basis for this assertion, Petitioner contends that the applicable state law was clear and that certification was unnecessary. (Petition pp. 59-62). This Court need give no further consideration to this issue because it is being raised here for the first time.

The matter of certification to the West Virginia Supreme Court was raised by the Fourth Circuit panel during oral arguments. Petitioner expressed no opposition. After the Order of Certification (including a statement of all relevant facts and questions of law to be answered) was certified to the state court, Petitioner filed a petition for rehearing. In that petition, Petitioner sought only an

amendment of the factual statements. He did not challenge the propriety of certification.[3]

Additionally, in the briefing submitted to the West Virginia Supreme Court upon the certified questions, Petitioner did not challenge the propriety of that Court's consideration. After the certified questions were answered adversely to Petitioner, he filed with the Fourth Circuit a Motion for Relief Notwithstanding the Opinion of the West Virginia Supreme Court of Appeals. Although challenging the content and thoroughness of the State Supreme Court opinion, he did not contend it lacked the authority to rule upon the issues certified. That motion was followed by the filing in the Fourth Circuit of Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. In that request, Petitioner contended that the "answers to this Court's certified questions given by the West Virginia Supreme Court were wrong because that Court simply ignored the linchpin material fact of the January 9, 1987 agreement." (Pet., 12 July 1994, at p. 7). Again, Petitioner did not challenge the Fourth Circuit's authority to certify questions to the State Supreme Court in this case, or the state court's power to answer them. He simply disagreed with the manner in which the state court answered the questions.

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[3]See Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc, 1 July 1993, p. 3:

> At the oral argument on this appeal, the court suggested that it might be appropriate to certify the legal issue underlying Plaintiffs' claims to the Supreme Court and sought counsel's views on that course of action. While plaintiffs' counsel had no objection to that procedure in the abstract, he did raise some concern as to how the Supreme Court would be provided with the facts on which to base its decision. The court responded that it would determine the facts with the assistance of counsel.

As review of the proceedings before the Fourth Circuit and West Virginia Supreme Court clearly shows, Petitioner upon numerous occasions sought to avoid the implementation of the rulings made by the West Virginia Supreme Court. Yet, at no time prior to the filing of his Petition for Certiorari, did he assert as an issue the matter now set forth in his Question 1(a) and (b), — the authority of the Fourth Circuit to certify these questions and the power of the West Virginia Supreme Court to answer them. Under these circumstances, this Court need give no further consideration to this matter.

## CONCLUSION

There is no substantive federal question which warrants this Court's attention. There is no issue which meets the parameters set forth in U.S. Supreme Court Rule 10. Respondents respectfully request that the Petition for Certification be refused.

Respectfully submitted,

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